Supreme Court, U.S.
FILED

No. 02 1406 MAR 17 2003

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CALLOWHILL CENTER ASSOCIATES, LLP,

Petitioner,

v.

SOCIETY CREATED TO REDUCE URBAN BLIGHT; MARY CRAWLEY TRACY; OLD CITY CIVIC ASSOCIATION AND KENSINGTON SOUTH NEIGHBORHOOD ADVISORY COUNCIL,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

Charles W. Bowser, Esquire
Luther E. Weaver, III, Esquire
Counsel of Record
BOWSER & WEAVER, P.C.
250 South 16th Street
Philadelphia, PA 19102-3334
(215) 790-0600

Attorneys for Petitioner

Dated: March 17, 2003

ST JVES BURRUPS/APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTIONS PRESENTED FOR REVIEW

1. Whether the City of Philadelphia's Sign Controls are unconstitutionally vague as applied to wall wrap displays?

2. Whether the City of Philadelphia's prohibition of all wall wrap displays while permitting murals to exist unregulated violates Petitioner's First Amendment right to enjoy freedom of speech and Petitioner's right to enjoy the equal protection of the law?

LIST OF PARTIES TO THE PROCEEDING

Petitioner is Callowhill Center Associates, LLP ("CA"), the legal owner of the subject property.

Respondents appear in the caption of case on the cover page as follows:

Society Created to Reduce Urban Blight;
Mary Crawley Tracy, individually;
Old City Civic Association;
Kensington South Neighborhood Advisory Council.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties to the Proceeding. ii

Table of Citations v

Opinions Below. 1

Basis for Jurisdiction 1

Relevant Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations. 2

Statement of the Case. 3

Argument 5

A. The City of Philadelphia's Sign Controls are Unconstitutionally Vague as applied to Wall Wrap displays 5

B. The City of Philadelphia's Prohibition of all Wall Wrap displays violates Petitioner's First Amendment right to enjoy Freedom of Speech and Petitioner's right to enjoy the Equal Protection of the Law 7

Conclusion 11

Appendix:

Order of the Supreme Court of Pennsylvania Dated December 17, 2002. . . . . 1a

Opinion and Order of the Commonwealth Court of Pennsylvania Dated July 11, 2002 . . . . . 3a

Opinion of the Court of Common Pleas of Philadelphia County Dated February 4, 2002 . . . 11a

Findings of Fact and Conclusions of Law of the Philadelphia Zoning Board of Adjustment Dated July 24, 2001 . . . . . 17a

TABLE OF CONTENTS

	Page
Section 14-506 of the Philadelphia Zoning Code .	26a
Section 14-1604 of the Philadelphia Zoning Code	34a
Section 14-1604.1 of the Philadelphia Zoning Code	41a

TABLE OF CITATIONS

Page

Cases:

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343 (1980) 8, 9, 10

Eller v. Board of Adjustment of London Britain Twp., 414 Pa. 1, 198 A.2d 863 (1964) 4

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294 (1972) 5

Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 S.Ct. 1614 (1977) 8

Meteromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882 (1981) 7, 8, 9, 10, 11

Norate Corp., Inc. v. Zoning Bd. of Adjustment of Upper Moreland Twp., 417 Pa. 397, 207 A.2d 890 (1965) 4

Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242 (1974) 5

United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710 (1975) 7

United States v. Powell, 423 U.S. 87, 96 S.Ct. 316 (1975) 7

Constitutional References:

First Amendment, U.S. Constitution. 8, 10, 11

Fourteenth Amendment, U.S. Constitution. 8, 10, 11

Statutes:

28 U.S.C. ¶2101(c) 1

TABLE OF CITATIONS — *(Continued)*

Page

Rules:

Rule 10(c) of the Supreme Court of the United States. . . 4

Rule 13 of the Supreme Court of the United States 1

Rule 13(1) of the Supreme Court of the United States . . 1

Ordinances:

Philadelphia Zoning and Planning Code:

§ 14-102(86)(k) 6

§ 14-506 7

§ 14-506(1) 7

§ 14-506(1)(a) 7

§ 14-506(l) 7

§ 14-1604 6

§ 14-1604.1 6

§ 14-1604(1) 6

§§ 14-1604(1)(I) and (m) 6

OPINIONS BELOW

1. Order of the Supreme Court of Pennsylvania dated December 17, 2002 denying Petitioner's Petition for Allowance of Appeal; No. 420 EAL 2002, Allocatur Docket, Supreme Court of Pennsylvania

2. Opinion and Order of the Commonwealth Court dated July 11, 2002, No. 3031 CD 2001, Commonwealth Court of Pennsylvania

3. Opinion of the trial court, Court of Common Pleas, Philadelphia County, April Term, 2001, No. 4486 dated February 4, 2002

4. Findings of Fact and Conclusions of Law of the Philadelphia Zoning Board of Adjustment dated July 24, 2001

BASIS FOR JURISDICTION

The order of which Petitioner seeks review is the Order of the Supreme Court of Pennsylvania was issued on December 17, 2002.

Pursuant to Rule 13 of the Rules of the United States Supreme Court, a Petition for writ of Certiorari to review a judgment in a civil case entered by a state court of last resort is timely when filed with the Clerk of the Court within 90 days after entry of judgment. (See Rule 13(1) (see 28 United States Code, §2101(c)). Therefore, the last date for filing an appeal from the subject order in this case is March 17, 2003.

RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 14-102(86)(k) of the Philadelphia Zoning Code provides as follows:

> (k) *Outdoor Advertising or Non-Accessory Sign.* A sign which directs attention to a business, industry, profession, commodity, service, organization, activity, institution, product, or entertainment neither sold, located nor offered upon the property where the sign is situated.

Section 14-506 of the Philadelphia Zoning Code is set forth verbatim in Appendix.

Section 14-1604 of the Philadelphia Zoning Code is set forth verbatim in Appendix.

Section 14-1604.1 of the Philadelphia Zoning Code is set forth verbatim in Appendix.

STATEMENT OF THE CASE

This is an appeal from the order dated December 17, 2002 of the Supreme Court of Pennsylvania denying Petitioner's Petition for Allowance of Appeal. This decision left in place the order of the Commonwealth Court of Pennsylvania dated August 21, 2002, denying Petitioner's Motion for Reconsideration/Reargument of its Opinion and Order of July 11, 2002, affirming the Order of the Court of Common Pleas of Philadelphia County (the trial court) of November 27, 2001. The trial court's November 27, 2001 order reversed the decision of the Philadelphia Zoning Board of Adjustment (the "Board") dated April 5, 2001. In its April 5, 2001 decision, the Board granted dimensional and use variances to Petitioner for the erection of one 65 foot by 140 foot, non-accessory, externally illuminated wall wrap display (the "subject wall wrap") on the south side of a seven-story building located at 413-53 North 7th Street, Philadelphia, Pennsylvania. In deciding the appeal, the Commonwealth Court: (1) failed to consider Petitioner's arguments that the applicable Zoning Code provisions are unconstitutional; (2) ruled that the sign Controls of the Philadelphia Zoning Code apply to the wall wrap in question; and (3) ruled that the Philadelphia Zoning Board of Adjustment erred as a matter of law in granting the variances to Petitioner.

The Zoning Board Hearing was held on February 14, 2001. There, Petitioner argued that the Zoning Code provisions applicable to signs were not applicable to wall wraps, the same argument being made in this Petition. At the hearing it was established that wall wrap is a relatively new form of display, unlike traditional signs and billboards. The evidence established that wall wraps are identical in all significant respects with wall murals which are plentiful throughout the City of Philadelphia and which are unregulated. It was also established that wall wraps were not contemplated when the Philadelphia City Council

adopted the Sign Controls and are not treated as a use governed by the Zoning Code.

Respondents appealed the Board's decision to grant dimensional and use variances to Petitioner to the Court of Common Pleas of Philadelphia County. In its brief before the trial court, Petitioner again raised the constitutional challenges involved in this Petition, i.e., that the sign control provisions of the Zoning Code could not be constitutionally applied to the subject wall wrap and that Petitioner should be entitled to receive equal protection under the law with owners of buildings which display murals, to which the subject wall wrap was akin.

The trial court erroneously ruled that the constitutional challenges were waived as not having been presented to the Board, even though as a matter of law, the Board could not invalidate a City ordinance. The trial court was in error as, the constitutional challenges were presented to the Board. Further, under Pennsylvania law, constitutional challenges could be presented to the trial court for consideration for the first time, even if not presented to the Board. *Norate Corp., Inc. v. Zoning Bd. of Adjustment of Upper Moreland Twp.*, 417 Pa. 397, 207 A.2d 890, 893 (1965); *Eller v. Board of Adjustment of London Britain Twp.*, 414 Pa. 1, 4-5, 198 A.2d 863, 865 (1964). Petitioner also contends that, when your very plea is of the right to speak, there can be no rule of law that you have waived that right on any level, constitutional or otherwise. Here, Petitioner asserted the right to speak, through the use of the subject wall wrap display, before the Board.

Petitioner contends, as set forth in Rule 10(c) of the Rules of the Supreme Court of the United States, that the Supreme Court of Pennsylvania has decided this matter contrary to the relevant decisions of this Court on important federal questions. Petitioner contends that:

(1) The City of Philadelphia's Sign Controls are unconstitutionally vague as applied to wall wrap displays;

(2) The City of Philadelphia's prohibition of all wall wrap displays while permitting murals to exist unregulated violates Petitioner's First Amendment right to enjoy freedom of speech and Petitioner's right to enjoy the equal protection of the law; and

(3) Petitioner's First Amendment rights were not waived as a matter of law.

ARGUMENT

A. The City of Philadelphia's Sign Controls are Unconstitutionally Vague as applied to Wall Wrap displays

Petitioner's due process rights were violated as Petitioner and those similarly situated received no prior notice that the courts would deem wall wraps to be signs regulated by the Philadelphia Zoning Code, Sign Controls. Due process requires that sanctions may be imposed on individuals only if they could reasonably have known in advance that their questioned behavior had been proscribed. A statute may be deemed void for vagueness, on it face or as applied, in order to ensure that individuals are fairly informed in advance regarding the specific conduct which a legislature has prohibited. *Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294 (1972).

The factual record supports the legal conclusion that no one could reasonably have contemplated that the Philadelphia Zoning Code Sign Controls would be deemed applicable to wall wraps. The characteristics of a wall wrap display that differentiate it from an outdoor advertising sign, or any other sign, which are stark, are present throughout the record.

The wall wrap is made of a translucent mesh fabric, unlike signs. Wall wraps, as murals, are physically attached to the Building's facade. There is no support structure for the wall wrap. Exhibits were introduced before the Board

detailing the subject wall wrap, as well as other wall wrap displays located throughout the country. Testimony established that in other jurisdictions, wall wrap displays are viewed as a use different from outdoor advertising signs.

The Controls are not applicable because the wall wrap is not an outdoor advertising sign within the contemplation of the Controls. Although the lower courts concluded that the wall wrap was an outdoor advertising sign as defined by Section 14-102(86)(k) of the Philadelphia Zoning Code, the Controls did not contemplate wall wrap displays, which did not exist when the Controls were established. The Controls were enacted to regulate billboards and their negative secondary effects. See as examples Phila. Code §§ 14-1604(1)(I) and (m), which provide that a goal of the Controls is to protect views of the skyline, etc. Neither wall wraps nor murals affect the skyline.

An examination of the Controls' public safety goals further illustrates the point that the Controls did not contemplate wall wrap displays. There is no nexus between the stated public safety goals found in Section 14-1604(1) and wall wrap displays. Wall wraps do not block view corridors, do not cast dark shadows on city streets, nor do they block traffic signs or attract litter and crime. In the instant matter, the stated public safety goals are even more attenuated. The subject wall wrap is located in an industrial area, far from any residential neighborhoods. The subject wall wrap does not advertise alcoholic beverages, tobacco or other vices.

It is clear from the record in this case that wall wraps were not contemplated when the Philadelphia City Council adopted the Controls and are not treated as a use governed by the Zoning Code.

Finally, because wall wrap displays are not signs within the contemplation of the Controls and are not specifically prohibited in the L-4 Limited Industrial Zoning District, or any other zoning district or overlay, the wall wrap is

permitted as of right. The plain language of Section 14-506, which contains the applicable use restrictions, does not simply permit certain enumerated uses and exclude all others. *See*, Phila. Code § 14-506(1). To the contrary, Section 14-506(1) specifies both permitted L-4 uses (Section 14-506(l)) and prohibited L-4 uses (Section 14-506(1)(a)).

Thus, the factual record contains a wealth of evidence to support the conclusion that no one could have reasonably contemplated that the Philadelphia Zoning Code Sign Controls would be deemed applicable to wall wraps. Due to the lack of notice to Petitioner that wall wraps would be so proscribed, the Controls are unconstitutionally vague, at least as applied, and violate the due process rights of Petitioner. See: *United States v. Powell*, 423 U.S. 87, 96 S.Ct. 316(1975); *United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710(1975).

B. The City of Philadelphia's Prohibition of all Wall Wrap displays violates Petitioner's First Amendment right to enjoy Freedom of Speech and Petitioner's right to enjoy the Equal Protection of the Law

Stated somewhat broadly, this case involves the right of government to regulate, indeed, prohibit, the use of "wall wraps" for the expression of ideas. This Court, in *Meteromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505, 101 S.Ct. 2882 (1981), which involved billboards, observed as follows:

> This Court has often faced the problems of applying the broad principles of the First Amendment to unique forms of expression.

Id., at 101 S.Ct., 2889. In applying these principles in various cases, this Court has held ". . . at times First Amendment values must yield to other societal interest." *Id.*

Thus, recognizing that government may legitimately regulate the non-communicative aspects of vehicles which

involve communicative and non-communicative components, this Court also observed that "the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects." *Id.*, at 2890. Courts are therefore *duty bound* to evaluate the constitutional impact imposed by regulation, which require a particularized inquiry into the conflicting interests at stake and the specific character of the regulations involved. *Id.* This duty is imposed upon the courts at every level when the right to speak is at issue. Thus, this Court's pronouncement of this duty condemns the decisions of the state courts in this case to declare a waiver of the constitutional assertion of the right to speak, when the heart and letter of Petitioner's application before the Zoning Board was the constitutionally protected right to speak. How could it have been waived?

This Court's expression of this duty to evaluate the First Amendment interests in Meteromedia was not a new pronouncement. In *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 91, 97 S.Ct. 1614, 1617 (1977), this Court stated:

> [A] court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

Here, the state courts violated the duty imposed by this Court. Had the state courts embraced this duty, it would have found that Petitioner's constitutional rights had been violated. The analysis the state courts avoided follows below.

Commercial speech, as with noncommercial speech, is entitled to free speech protections, *Id.* at 2892-2895, although traditionally commercial communications are afforded less constitutional protection that other forms of protected communication. *Id.* at 2892. The protection afforded commercial speech turns on the nature of the expression and the governmental interest to be served by the regulation. *Id.* Thus, in *Central Hudson Gas & Electric*

Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343 (1980), this Court established a four-part test for determining the validity of governmental regulation upon commercial speech as opposed to more fully protected speech: (1) the speech must be lawful and not misleading; (2) the restriction on otherwise valid speech must seek to implement a substantial governmental interest; (3) the regulation must directly advance that interest; and (4) the regulation must reach no further than is necessary to accomplish the given objective. *Id.*, 100 S.Ct. at 2350.

This appeal does not question the right of the government to regulate the commercial speech involved in this case. This appeal involves a clear and unequivocal principal recognized by this Court in *Metromedia*, to wit: when commercial speech, and noncommercial speech are expressed in a similar fashion, the government may not constitutionally prohibit one and permit the other.

In *Meteromedia*, this Court considered a San Diego ordinance which permitted commercial billboards to be displayed in a given area, with exceptions, but which prohibited noncommercial billboards from being displayed at all. This Court observed:

> The use of onsite billboards to carry commercial messages is freely permitted, but the use of otherwise identical billboards to carry noncommercial messages is generally prohibited.

Id. at 2895. Finding that the City did not explain how or why noncommercial billboards would be more threatening to safety and welfare than commercial billboards, this Court concluded:

> Insofar as the City tolerates billboards at all, it cannot choose to limit their content to commercial messages; the City may not conclude that the communication of commercial information . . . is of greater value than the communication of noncommercial messages.

Id. at 2895.

This Court concluded that, because the San Diego ordinance "reaches too far into the realm of protected speech" the ordinance was unconstitutional on its face, as violative of the First Amendment. *Id.* at 2899.

Here, murals are permitted throughout the City as an unregulated use, while wall wraps are prohibited. The record below clearly establishes that the wall wrap is akin to a wall mural. The wall murals seen throughout Philadelphia have many attributes similar to wall wraps. They are comparable in size, with wall wrap typically being even larger. By their size alone, they are distinctly distinguishable from traditional signs. Both are non-accessory in nature. Both are physically attached to a building's facade. Both are frequently illuminated. Neither the wall wrap nor the mural are signs as defined by the Philadelphia Zoning Code. (See Section "A" above). Both murals and wall wraps convey messages – one commercial in nature, one expressive, and both are protected under both the First and Fourteenth Amendments of the U.S. Constitution. *Meteromedia, Inc. v. City of San Diego, supra.*

The position of the lower courts does not meet the test established by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, supra, for determining the validity of governmental regulation upon commercial speech. First, the wall wrap in question is lawful and not misleading. Secondly, since the speech is lawful, there is no substantial governmental interest in banning all wall wraps. Signs, as defined in the law, and the articulated interests sought to be achieved by sign regulation is not served by banning wall wraps. As proof, such articulated interest cannot be achieved by banning wall wraps but permitting murals, between which there is no significant distinction. As a result, the third test has not been met since banning wall wraps but permitting murals does not advance any purported interest. Finally, the forth test cannot be met since the regulation reaches much further than is necessary

to accomplish the given objective. No distinction is made in the regulations between wall wraps which are identical to murals and those which may be distinguished. This broad sweep bars legitimate speech by any stated set of standards which permits murals to be displayed. In other words, the ordinances in this case reach "too far into the realm of protected speech." *Meteromedia*, supra., at 2899.

As a result, Petitioner's First amendment rights have been violated as well as Petitioner's right to enjoy the equal protection of the laws in violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons and in the interest of justice, Petitioner respectfully prays that this Court grants this Petition and accepts this appeal.

Respectfully submitted,

Charles W. Bowser, Esquire
Luther E. Weaver, III, Esquire
BOWSER & WEAVER, P.C.
250 S. 16th Street
Philadelphia, PA 19102
(215) 790-0600

Attorneys for Petitioner

Dated: March 17, 2003